Supreme Court, U.S.
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No. 90-1321

In The

Supreme Court of the United States

October Term, 1990

NATIONAL MEDICAL ENTERPRISES, INC.,

Petitioner,

v.

LOUIS W. SULLIVAN, M.D., SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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In his Brief in Opposition the Secretary makes a variety of arguments, most of which are adequately refuted by NME's Petition. However, two arguments pertaining to the collateral estoppel issue require the filing of this brief reply memorandum. Those arguments are (1) that NME is not a "proper party" in these proceedings (Opposition at 6-7); and (2) that there have been significant changes in the law since the issuance of the Court of Claims decision in *AMI-Chanco* and those changes preclude application of collateral estoppel to avoid "inequitable administration of the laws" (Opposition at 7-10).

With respect to the improper party allegation, the Secretary suggests that by naming NME as the plaintiff in this litigation NME used "sleight of hand" to try to establish the mutuality necessary to invoke collateral estoppel against the government. (Opposition at 7.) Nothing could be less accurate. If there has been any sleight of hand, it has been on the part of the Secretary who engaged in forum shopping to avoid the impact of the Claims Court's adverse decision in the previous NME litigation. The Secretary would not be in the position of trying to avoid collateral estoppel if he had appealed the adverse Claims Court decision and, if necessary, eventually had sought review of the corporate maintenance cost issue before this Court. Rather than following this appropriate procedure, the Secretary chose to ignore the Claims Court decision and forced NME to relitigate the issue in another Circuit.

NME is indeed the appropriate party to have pursued this matter through the courts. NME incurred the corporate maintenance costs in the first place. As the home office for its wholly owned hospital subsidiaries,

NME was entitled to pursue reimbursement for the corporate maintenance costs in issue on behalf of its providers.

Indeed, pursuant to 42 U.S.C. Section 1395oo(f)(1), NME was required to pursue the corporate maintenance costs issue on behalf of its providers as a "group appeal." 42 U.S.C. § 1395oo(f)(1). The Secretary designated NME as the appropriate party before the Provider Reimbursement Review Board and before the Health Care Financing Administration, the entity which reviews final PRRB decisions on behalf of the Secretary. (App. at 26, 47.)

NME initiated the judicial review proceedings in the District Court on behalf of its wholly owned providers. The Secretary made no objection to NME doing so in its answer to NME's complaint and, in fact, expressly admitted that NME was the home office for each provider in question. Complaint and Answer, ¶ 4. Importantly, the providers were expressly incorporated into the complaint by NME by reference, Complaint, ¶ 4, and Exhibit 1 to Complaint.[1]

Moreover, the statutory provision relied on by the Secretary to argue that NME is not a proper party, 42

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[1] Only in a last-minute attempt to try to avoid the impact of collateral estoppel did the Secretary assert that NME was not a proper party before the District Court. Had the Secretary appropriately and timely raised the issue in the District Court in his Answer or through some type of motion, the District Court could have reviewed the issue. At worst, NME would have been required simply to amend its Complaint to add to the caption of the Complaint the names of the providers referred to and incorporated in paragraph 4 of the Complaint.

U.S.C. § 1395oo(f)(1), simply addresses the venue issue for judicial review of Medicare decisions and does not resolve the "capacity" issue. The identity of the providers only determines the appropriate venue for subsequent judicial review.

The second assertion, *i.e.*, there have been changes in the law which preclude application of collateral estoppel, is equally baseless. The governing Medicare statute, regulations and manual provisions have not changed in substance with respect to corporate maintenance costs since the United States Court of Claims issued its decision in *AMI-Chanco* and certainly have not changed since the Claims Court issued its decision in favor of NME. The material facts pertaining to NME's corporate maintenance costs for the 1973 fiscal year are identical to the facts applicable to the subsequent fiscal years, the years in question. Indeed, the Secretary has never before asserted or relied on any argument that there has been a change in the law or the facts.

The Secretary's assertion that there "have been significant changes in the pertinent legal landscape" (Opposition at 9) reflects nothing more than the fact the Courts of Appeals for the D. C. Circuit and the Fifth Circuit issued decisions contrary to the United States Court of Claims decision in *AMI-Chanco*. This disagreement among the circuits does not constitute significant changes in the law but simply represents a difference of opinion on how the law should be interpreted. If anything, this fact simply confirms why the Court should grant certiorari.

Finally, the application of collateral estoppel against the government in this case does not help to avoid inequitable administration of the law. Rather, its application will foster uniform application of law. If the Court of Appeals' decision in this case is not overturned, some of NME's hospitals will have received reimbursement for corporate maintenance costs while others will not have. If collateral estoppel is applied all of NME's hospitals will be treated uniformly. The fact that NME's hospitals will receive reimbursement for corporate maintenance costs while other unrelated hospitals might not simply reflects that NME prevailed in its initial lawsuit against the Secretary while these other hospitals failed. Indeed, this fact also shows why this Court should involve itself in the resolution of the merits of the validity of the Secretary's corporate maintenance costs. It certainly does not provide support for abandoning collateral estoppel.

In conclusion NME continues to urge the Court to grant its Petition for Certiorari.

DATED: April 24, 1991

Respectfully submitted,

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